In the Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1975

No. 75-1038

DIAMOND NATIONAL CORPORATION,
a Delaware corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee,

CROCKER CITIZENS NATIONAL BANK,
a National banking association,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two

Petition for Rehearing

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Now Comes the California State Board of Equalization And Respectfully Prays the Court to Grant a Rehearing in This Case Upon the Grounds That the Per Curiam Decision Herein Overrules, Sub Silentio, Gurley v. Rhoden, 421 U.S. 200 (1975), Eliminates Past Guidelines Regarding Legal Incidence of Excise Taxes Without Providing New Ones, Portends Multiplicity of Litigation, Makes Summary Disposition of a Matter Which Will Have a Multimillion Dollar Impact Upon Each of Many States, And Places a Dual Burden On Taxpayers Who Have In the Past Been Charged to Cover Banks Costs, Including Sales Tax Reimbursement, And Must Now Foot the Bill For a Refund of Those Same Amounts to the Banks.

I

On April 19, 1976, this Court in a three sentence per curiam decision reversed the opinion of the California Court of Appeal upholding the validity of the application of the California sales tax to sales to national banks. This Court held that for purpose of federal law the legal incidence of the California sales tax was on the national banks in violation of 12 U.S.C. § 548. This action was taken by the Court without the submission to it of briefs on the merits and without the presentation of oral argument. The sole authority relied on by the Court was *Agricultural Bank v. Tax Commission,* 392 U.S. 339 (1968).

II

Yet, under the rule set forth in the *Agricultural Bank v. Tax Commission, supra,* and reaffirmed in the subsequent decisions in *Gurley v. Rhoden,* 421 U.S. 200 (1975) and *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975), the legal incidence of an excise tax for federal purposes is on the purchaser only if State law requires the purchaser to pay the tax or reimburse the vendor for a tax payment. Accordingly, under the standards previously applied by this Court, the legal incidence of the California sales tax has always been on the retailer and not on the purchaser national bank. This follows from the fact that under the California sales tax law, as applied uniformly since its enactment forty years ago, there has been no legal obligation that the purchaser pay the tax himself or reimburse the vendor (see Dissent, page 2). Accordingly, although the per curiam decision purports to rely on *Agricultural Bank v. Tax Commission,* 392 U.S. 339 (1968), *supra,* it has in fact ignored the rationale of that decision and in effect overruled the decision in *Gurley v. Rhoden,* 421 U.S. 200 (1975). Thus the Court has eliminated all prior guidelines for determining the legal incidence of a state excise tax for federal purposes.

While the per curiam decision retroactively eliminates the prior rules for determining the legal incidence of an excise tax, it offers no new rules or standards to replace the now abandoned criteria this Court has found sound and usable for many decades. Does the determination of the legal incidence of a tax now turn on the identity of the party challenging its application? Would the legal incidence of the state excise tax on gasoline involved in *Gurley v. Rhoden, supra,* have been regarded as falling on the purchaser if a national bank had challenged its application to it? This seems unthinkable. Or is this Court deciding that in determining the legal incidence of a tax the Court will only look to the language of the statute in a complete vacuum while disregarding the way the tax has been consistently administered and applied in the taxing jurisdiction for decades? Such a conclusion would be directly

contrary to this Court's holding in *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975), *supra,* wherein the Court determined that the legal incidence of the tax was on the purchaser based upon the manner in which the tax was actually administered. See also *St. Louis S.W. Ry. Co. v. Arkansas,* 235 U.S. 350 (1914). It is difficult to believe that the per curiam decision was based on the premise that administrative construction of a statute is devoid of relevance. In short, the per curiam decision sets us adrift in a rudderless craft to an unspecified destination in a very important area of tax law. This will inevitably result in a multiplicity of litigation by other taxpayers relying on some federal right or immunity in an effort to discover what are the new criteria for determining legal incidence for federal purposes.

III

As observed in the dissenting opinion, the task of determining where the legal incidence of a state tax falls is not the most intriguing work that judges are called upon to perform. Nevertheless, there is a necessity for clear, consistent and meaningful standards to be applied in this regard. The per curiam decision herein eliminates without explanation past guidelines in this regard. Only a void remains. The absence of guidelines will precipitate a rash of litigation with regard to the particular feature or features of the California sales tax and/or the identity of its challenger which caused this Court to conclude the legal incidence fell upon the purchaser for federal purposes. For example, would this Court conclude the legal incidence for federal purposes would be on the retailer if California repealed section 6052 of the Revenue and Taxation Code which provides: "The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done."

IV

Moreover, the fiscal implications of the Court's decision dramaticaliy demonstrates the inapproprietness of the summary per curiam vehicle used. For example, the fiscal impact of the reversal herein on California and its political subdivisions (whose sales tax is based on the state law) for past periods will be millions of dollars with respect to sales to national banks alone, and tens of millions of dollars more when consideration is given to the application of the decision to sales tax with respect of other federal instrumentalities. The refunds covering past years will further imperil the finances of many California cities sharing the nationwide fiscal malaise of large metropolitan areas which is a plainful reality of the seventies. Needless to say, other states with comparable sales tax laws will be similarly affected.

V

If this decision is allowed to stand, it will, moreover, result in placing a dual burden on the taxpayers of this State. Since the California sales tax has been applied to sales to national banks for many decades, it is axiomatic that the amounts paid by them as sales tax reimbursement has become part of the overhead costs considered by the banks in determining charges to their customers, e.g., sales tax reimbursement on printed checks would be reflected in setting checking account fees. By retroactively changing the rules of the game through its per curiam decision herein, this Court will now require California taxpayers to again reimburse national banks (this time out of general tax revenues) many costs which the banks have already recovered in higher charges to customers.

VI

It is respectfully submitted that a rehearing should be granted since the per curiam reversal fails to apply the standards previously established by this Court for determining legal incidence. Moreover, the per curiam decision furnishes no new guidelines for those it has silently abandoned and will encourage further litigation. Principles of sound jurisprudence as well as basic fairness require a rehearing. Either the opinion of the Court of Appeal should be affirmed as contended by the dissenting justices herein or the Court should clearly delineate the new standards for legal incidence which it believes require a reversal herein after full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Ernest P. Goodman, one of the Attorneys for Appellee, certify this petition is presented in good faith and not for delay.

San Francisco, California, Dated May 5, 1976.

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